Filed 4/8/19 P. v. Ortiz CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL ANTHONY ORTIZ, Defendant and Appellant.	E070968 (Super.Ct.No. BAF1500887) OPINION

APPEAL from the Superior Court of Riverside County. W. Charles Morgan, Judge. Affirmed.

Richard Power, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

Michael Ortiz appeals his robbery conviction, arguing the record lacks sufficient evidence to convict him as an accomplice or a direct perpetrator. As we explain below, we conclude the record contains sufficient evidence he aided and abetted his codefendant, Oscar Sualez, in robbing the victim. We will therefore affirm.

I

FACTS

This is the second time these events come before us. The incident occurred in the fall of 2015, and the prosecution tried Ortiz and Sualez together in January 2016. Sualez filed a timely appeal, which we resolved in an unpublished opinion (E065956), concluding there was sufficient evidence to support his conviction as the direct perpetrator of the robbery. In July 2018, we granted Ortiz permission to file a late appeal.

The relevant evidence presented at trial is as follows. The victim testified that on the morning of September 28, 2015, he was in his front yard with his 130-pound Bullmastiff. He noticed a black SUV with a woman in the driver's seat drive by his house three times before pulling up fast into his driveway. Sualez jumped out of the car, ran to the side of the house, and grabbed the victim's antique fire hydrant. The dog went up to Sualez and started barking, and Sualez responded by striking it across the nose with the hydrant. Yelling at Sualez to stop, the victim ran over and punched him in the back of the head. Sualez screamed for help and ran back into the car. Ortiz then jumped out of the backseat and threw a half-full can of beer at the victim. The can hit the victim in

the chest but did not cause any injuries. As the SUV drove off, the victim photographed the license plate with his phone and reported the incident to the police.[1] Within an hour, the police found Ortiz, Sualez, and the driver about a mile from the victim's house with the fire hydrant in their possession.

When asked if he had been afraid for himself during the altercation, the victim said, "Yes." He later clarified that while he was not personally afraid of Ortiz and Sualez, he feared for his grandparents, who were present during the incident.

The jury found both Ortiz and Sualez guilty of one count of robbery. (Pen. Code, § 211, unlabeled statutory citations refer to this code.) The trial court also found Ortiz had violated his mandatory supervision. The court sentenced him to the mid-term of three years for the robbery and ran his mandatory supervision violation sentences concurrently.

II

ANALYSIS

Ortiz contends the record contains insufficient evidence he aided and abetted Sualez in committing the robbery. He argues the robbery was already complete when he threw the beer can at the victim, and thus at most he is guilty of battery or being an accessory after the fact. Ortiz misconstrues accomplice liability.

---

[1] By happenstance, the victim was on the phone with a 911 dispatcher during the incident. Just before defendants pulled into his driveway, he had called to report an accident and heavy traffic in his neighborhood. As the events played out, the dispatcher transferred him to California Highway Patrol. The prosecution played the transcript of the call for the jury to corroborate the victim's testimony about the robbery.

All those concerned in the commission of a crime, "whether they directly commit the act constituting the offense, or aid and abet in its commission," are considered principals. (§ 31.) "Thus, a person who aids and abets a crime is guilty of that crime even if someone else committed some or all of the criminal acts." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117.) To prove accomplice liability, "the prosecution must show the defendant acted 'with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.'" (*Id.* at p. 1118.) "[A]mong the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense." (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409 (*Campbell*).)

Robbery is the taking of personal property from another's possession "by means of force or fear." (§ 211.) There are two aspects to the taking element—"caption" (gaining possession of the victim's property) and "asportation" (carrying the property away). (*People v. Gomez* (2008) 43 Cal.4th 249, 255.) Although the slightest movement may constitute asportation, the robbery "continues until the perpetrator has reached a place of temporary safety with the property." (*Ibid.*) The force necessary to convert theft into robbery is not violent or significant, but merely "some quantum of force in excess of that 'necessary to accomplish the mere seizing of the property.'" (*People v. Anderson* (2011) 51 Cal.4th 989, 995.)

When reviewing a claim of insufficient evidence, we consider the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—"evidence which is reasonable, credible, and of solid value"—to allow a reasonable jury to find the defendant guilty. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) "[O]ur opinion that the evidence could reasonably be reconciled with a finding of innocence or a lesser degree of crime does not warrant a reversal of the judgment." (*People v. Hill* (1998) 17 Cal.4th 800, 849.) Reversal is required only when "it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support'" the conviction. (*People v. Manriquez* (2005) 37 Cal.4th 547, 577.)

Ortiz concedes Sualez committed robbery, but he argues there was no evidence that he knew his codefendant intended to rob the victim or that he helped him do so. To the contrary, the record contains sufficient evidence to allow the jury to convict Ortiz as an accomplice. *Campbell* is illustrative.

In that case, Campbell's codefendant, Smith, argued his presence at the scene of an attempted robbery and his failure to prevent the crime were insufficient bases for accomplice liability. (*Campbell, supra,* 25 Cal.App.4th at p. 409.) The appellate court rejected his characterization of the evidence and concluded the record showed more than mere presence and failure to interfere. The evidence showed Smith had been hanging out with Campbell when they walked past the two victims, who were a couple. Seeing they were vulnerable and isolated, Smith and Campbell returned to their location and approached them together. (*Id.* at pp. 406, 409.) While Campbell pointed a gun at the

boyfriend and said, "this is a robbery," Smith "remained in position in front of [the victims]." (*Ibid.*) The court explained that Smith and Campbell's "concerted action" in walking by the couple and then returning to them reasonably implied a "common purpose." (*Id.* at p. 409.) In addition, "[t]he jury could reasonably conclude that Smith assumed his position in front of [the victims] to intimidate and block them, divert suspicion, and watch out for others who might approach." (*Ibid.*) In the court's view, the concerted action and Smith's positioning during the attempted robbery was "a textbook example of aiding and abetting." (*Ibid.*) That Smith did not act surprised when Campbell pulled out the gun or try to interfere with his conduct, but instead stood in a helpful position preventing the victim's from escaping, gave the jury a reasonable basis to infer Smith "knew about and shared Campbell's intent to rob [the boyfriend] and that in a supportive role, he affirmatively facilitated Campbell's attempt." (*Id.* at p. 410.)

Similarly here, Ortiz's conduct gave the jury a reasonable basis to conclude he knew about and shared Sualez's intent. Ortiz scoped out the victim's house with Sualez, driving by three times, and accompanied him to the driveway. Then, rather than act surprised or try to interfere when Sualez jumped out and stole the fire hydrant, Ortiz responded to his call *for help* by hitting the victim in the chest with a can of beer. The jury could reasonably infer from this behavior that Ortiz knew Sualez intended to rob the victim and endeavored to help him do so. Ortiz attempts to distinguish this case from *Campbell* by pointing out that Smith continued to harass the girlfriend after the attempted robbery, to keep her from running away and reporting the crime. However, the court

simply noted that Smith's subsequent conduct gave *additional* support to his aiding and abetting conviction. The court concluded Smith's conduct before and during the robbery was sufficient on its own to support the conviction. (*Campbell*, *supra*, 25 Cal.App.4th at pp. 409-410.)

Next, Ortiz points to our conclusion from the earlier opinion that Sualez had committed robbery—by means of constructive force (hitting the dog) and fear—by the time he entered the car, that is, *before* Ortiz threw the beer can at the victim. Ortiz argues he cannot be an accomplice to the robbery because it was already over when he acted. He is incorrect. Sualez may have satisfied the elements of robbery before Ortiz threw the can, but a robbery continues until the perpetrators have reached a place of temporary safety. (*People v. Gomez*, *supra*, 43 Cal.4th at p. 255; *People v. Cooper* (1991) 53 Cal.3d 1158, 1164 ["For purposes of determining aider and abettor liability, the commission of a robbery continues until all acts constituting the offense have *ceased*[, including] . . . the final element of the robbery, asportation"].) Thus, the jury could reasonably infer from his act of throwing the can—right after Sualez called out for help—that he did so with the intent to stop the victim from chasing after them, or at least to buy enough time for them to drive off and reach a place of temporary safety. And contrary to Ortiz's assertion, the car was not a place of temporary safety because it remained on the driveway, the scene of the crime, where the victim was on the phone with the police, reporting the robbery. (E.g., *People v. Flynn* (2000) 77 Cal.App.4th 766, 772 [the scene of the crime is not a place of temporary safety "at least as long as the victim remains at hand"].) Ortiz's

reliance on our analysis of Sualez's liability as a direct perpetrator is misplaced. In our previous opinion, we had no occasion to consider the duration of the robbery. Here, for purposes of Ortiz's liability as an aider and abettor, we conclude the record supports a finding the crime continued until Sualez and Ortiz drove away from the victim's house.

Finally, we reject Ortiz's contention he could not have facilitated their retreat to a place of temporary safety because the victim was not scared or deterred by the beer can. An accomplice need only give "aid or encouragement *with the intent or purpose of facilitating the perpetrator's commission of the crime*"—there is no additional requirement the accomplice succeed in that intent. (*People v. McCoy*, *supra*, 25 Cal.4th at p. 1118, italics added.) In other words, whether or not the can of beer actually deterred the victim from trying to regain his property is irrelevant. It is sufficient that Ortiz's act of throwing the can allowed the jury to reasonably infer he was *intending* to encourage or facilitate their getaway.

Because we conclude the record supports accomplice liability, we need not address the two challenges Ortiz raises based on direct perpetrator liability—(1) that there is no evidence he "supplied the element of 'force or fear'" for the robbery and (2) that the court used the wrong circumstantial evidence instruction in the event his throwing the can constituted the force or fear for the robbery. To be liable as an accomplice, one need only have (1) known about the direct perpetrator's intent to commit the crime and (2) acted with an intent to encourage or facilitate the crime. An accomplice need not satisfy any of the elements of the crime, and so the prosecution was not required to prove Ortiz

used force or fear in playing a supporting role in the robbery. (*People v. McCoy*, *supra*, 25 Cal.4th at p. 1117 ["a person who aids and abets a crime is guilty of that crime even if someone else committed some or all of the criminal acts"].)

III

DISPOSITION

We affirm the judgment.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

SLOUGH
J.

We concur:

McKINSTER
Acting P. J.

MILLER
J.